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IN THE

Supreme Court of the United States

October Term, 1947
No. 833

W. L. SANDSTROM,

Petitioner,

vs.

CALIFORNIA HORSE RACING BOARD and LOYD WRIGHT, DWIGHT D. MURPHY and NION R. TUCKER, Members of the California Horse Racing Board,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Respondent opposes the granting of a writ of certiorari herein upon the ground that no substantial Federal question is involved.

Petitioner's Claim of Jurisdiction.

Petitioner claims jurisdiction under Section 237(b) of the United States Judicial Code, 28 U. S. C. A. 344(b); and the asserted Federal question is the alleged repugnance to the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitu-

tion (Pet. for Certiorari, pp. 3, 5) of the rule of the California Horse Racing Board making the trainer the absolute insurer of and responsible for the condition of the horses entered in a race upon the result of which there shall be wagering.

The record in this case upon the claim of invalidity grounded on asserted repugnance to the due process clause of the Fourteenth Amendment is as indefinite as that mentioned in *People of State of New York v. Zimmerman*, 278 U. S. 63, 67-8, 49 S. Ct. 61, 63, 73 L. Ed. 184, and the petition in the State Court of first instance here, as in that case, while asserting that the rule in question "was 'unconstitutional,' contained no mention of any constitutional provision, state or federal."

However, in the hearing in the State Supreme Court it was held that the import of the rule here in question is to impose strict responsibility upon the trainer for the condition of the horse, and that Court stated that the question was whether strict liability for the condition of a race horse can be constitutionally imposed upon the trainer of the horse. [R. 41.]

After quoting from *City of Chicago v. Sturges*, 222 U. S. 313, 322, the State Court went on to hold [R. 42]: "That the imposition of strict liability whether by statute or judicial decision does not of itself contravene the due process clauses of the federal or state Constitutions may not be disputed."

Accordingly, we make no claim that this case does not come technically within the purview of Section 237(b). Our contention is that the Federal question here involved is so lacking in substance as not to warrant the issuance of this writ.

ARGUMENT.

Summary of Argument.

1. The Federal question must be so substantial as to require analysis and exposition for the purpose of determination.

2. The constitutionality of the right to impose strict liability is well established, and there is no conclusive presumption of evidence involved.

3. The rule in question is a reasonable exercise of the police power of the State.

4. A full and fair hearing was had by petitioner.

5. Maryland, Florida and New York decisions discussed.

6. Possible application to extreme cases is not criterion of reasonableness.

Federal Question Must Be Substantial.

The mere assertion by petitioner that the rule here involved, making a trainer "the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties," is so unreasonable, arbitrary and capricious that it violates the Fourteenth Amendment to the Federal Constitution does not necessarily require this Court to grant certiorari and to review the judgment of the State Court.

None of the cases cited by petitioner (Pet. for Certiorari p. 4) in support of jurisdiction treat of the substantiality of the Federal question involved.

It is not sufficient that a Federal question has been timely and properly raised in the State Court, that the

proper mode of review by the Supreme Court has been selected, and that the appeal or application for writ of certiorari has been properly perfected. The character of the Federal question involved in the cause is also a criterion of the Court's jurisdiction to review, and if the Federal question is found to be "unsubstantial" the Supreme Court may deny the petition for writ of certiorari.[1]

Mr. Chief Justice White said:[2] "that although . . . it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy," the cause will be dismissed. "Mere allegation of a federal question" will not suffice. "There must be a real, substantive question on which the case may be made to turn, that is, a real and not a merely formal federal question is essential to the jurisdiction" of the Supreme Court.

If the questions presented are so wanting in substance as not to need further argument in view of previous decisions of this Court, certiorari will be denied.[3]

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[1]Jurisdiction of the Supreme Court of the United States, Robertson & Kirkman, page 95; *Gaines v. Washington*, 277 U. S. 81, 87, 48 S. Ct. 468, 469, 72 L. Ed. 793; Rules Supreme Court, Rule 38, par. 5.

[2]*Equitable Life Assurance v. Brown*, 187 U. S. 308, 311, 23 S. Ct. 123, 124, 47 L. Ed. 190.

[3]*Boston v. Jackson*, 260 U. S. 309, 314, 43 S. Ct. 129, 131, 67 L. Ed. 274.

In essence the inquiry whether a substantial Federal question is involved in the given case is not to be distinguished from the question whether there is merit in the arguments advanced for the reversal of the judgment or decree sought to be reviewed. The test is said to be whether the question requires analysis and exposition for its decision.[4]

Constitutionality of Imposition of Strict Liability Is Well Established.

It is true that this Court has not heretofore passed upon the constitutionality of a rule making the trainer the absolute insurer of and responsible for the condition of the horses entered in a race upon the results of which there is wagering. We do submit, however, that the imposition of strict liability or guaranty has been so firmly established as not being repugnant to the due process clause of the Fourteenth Amendment that, as the State Supreme Court said, it is no longer open to dispute. The State Supreme Court in its decision [R. 42] cited numerous instances in which the imposition of strict liability had been sustained.

It is the contention of petitioner that such strict liability may not be constitutionally imposed when the trainer "is without fault, guilty knowledge, participation, or

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[4]Jurisdiction of the Supreme Court, *supra*, p. 97; *Milheim v. Moffat Tunnel etc.*, 262 U. S. 710, 716, 717, 43 S. Ct. 694, 696, 67 L. Ed. 1194; *Hodges v. Snyder*, 261 U. S. 600, 601, 43 S. Ct. 435, 67 L. Ed. 819.

culpable negligence or indifference." (Pet. for Certiorari p. 5.)

We are concerned at this stage of the proceedings only with whether the asserted repugnance of the rule in question to the Fourteenth Amendment in the light of the California Supreme Court determination requires analysis and position for decision now, or whether the principle of law involved has been thoroughly established by the decisions of this Court.

Petitioner makes no attempt to contravene, discuss, or question the proposition stated by the Supreme Court of California [R. 42] that the imposition of strict liability does not of itself contravene the due process clauses of the constitution, nor does he mention any of the cases cited in support of that proposition other than to merely make reference to the case of *City of Chicago v. Sturges,* 222 U. S. 313. (Pet. for Certiorari p. 6.)

Petitioner relies for support in his appeal to this Court solely upon the proposition that the Legislature may not declare an individual guilty or presumptively guilty of a crime, nor may it make proof of one fact or group of facts conclusive evidence of the existence of the ultimate fact on which guilt is predicated, if there be no rational connection between such proven fact and the ultimate fact.

In support of his contention that the rule in question is repugnant to the Fourteenth Amendment, petitioner cites a line of authorities having to do with the proposition of making proof of one fact prima facie or conclusive evidence of the ultimate fact upon which guilt is predicated, but having nothing to do with the constitu-

tionality of the imposition of strict liability.[5] Those cases recognize, as stated in the *Turnipseed* case, that "Legislation providing that proof of one fact shall constitute

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[5]*Manley v. Georgia,* 279 U. S. 1, 7, 49 S. Ct. 215, 217, 73 L. Ed. 575 (Georgia statute declared every bank insolvency to be fraudulent and made president and directors subject to imprisonment and labor for from 1 to 10 years);

McFarland v. American Sugar Refining Co., 241 U. S. 79, 86, 36 S. Ct. 498, 501, 60 L. Ed. 899 (Louisiana statute made any person who systematically paid less for sugar in Louisiana than he paid elsewhere *prima facie* guilty of monopoly or conspiracy in restraint of trade);

Tot v. United States, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (Federal Firearms Act made possession of a firearm by anyone theretofore convicted of a crime of violence presumptive evidence that such firearm was transported in interstate commerce and in violation of the Act);

Morris v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664 (California Alien Land Law provided that when prosecution had established the acquisition, possession or transferring of real property by or to defendant and the indictment alleged defendant's ineligibility to United States citizenship, the burden of proving such eligibility thereupon devolved upon the defendant). Compare this with *Morrison v. California,* 288 U. S. 591, 53 S. Ct. 401, 77 L. Ed. 970, where court sustained an earlier provision of the same law providing that when it was proved that defendant had been in the use or occupation of real property and also proved that he was a member of a race ineligible to citizenship, the burden then should rest upon defendant of proving citizenship as a defense.

Western etc. R. R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884 (Georgia statute made proof of collision and resulting death a presumption that the railroad and its employees were negligent and that every act or omission in the specifications of negligence was the proximate cause of the death and making the railroad company liable unless it showed due care in respect of every matter alleged against it).

Mobile etc. R. R. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (Mississippi statute made proof of injury inflicted by running of locomotives or cars *prima facie* evidence of the want of reasonable skill and care on the part of the railroad).

Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772 (Federal Revenue Act of 1926 provided that every transfer made within two years prior to the death of the decedent shall be deemed and held to have been made in contemplation of death).

prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government." The criterion, as stated in the *Manley* case, is said to be whether there is a rational connection between what is proved and what is to be inferred. "If the presumption is not unreasonable and is not made conclusive of the right of the person against whom raised, it does not constitute a denial of due process of law."

This line of authorities is particularly applicable to the rule involved in the Maryland case of *Mahoney v. Byers*, ... Md. ....., 48 Atl. (2d) 600. The rule there did not impose strict liability upon the trainer and make him the insurer or guarantor of the sound condition of the horse. It made the offense consist of the administration, or of knowingly or carelessly permitting the administration, of a drug to the horse, and then went on to provide that the presence of the drug should be conclusive evidence either that there was knowledge of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered.[6]

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[6]Rule 146, Maryland Racing Commission, 48 Atl. (2d) 602:

"(a) No person shall administer, or knowingly or carelessly permit to be administered to any horse entered for a race, any drug in any way within forty-eight hours before the time of the race.

"(d) If the commission finds from an analysis of the saliva or urine, or blood taken from a horse on the day of a race in which the horse ran, or from other competent evidence, that any drug has been administered to the horse within forty-eight hours before the race, the trainer shall be subject to the penalties prescribed in subsection (e) hereof, whether or not he administered the drug, or knowingly or carelessly permitted it to be administered. The fact that the analysis shows the presence of a drug shall be conclusive evidence either that there was knowlege of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered."

Rule Is Reasonable Exercise of Police Power.

The guaranty of due process, which is all that we are here concerned with, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.[7]

Where the legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision.[8]

That the mere imposition of strict liability does not of itself contravene the due process clauses of the Federal Constitution and is not unreasonable, arbitrary or capricious, is well exemplified by the decisions cited in the opinion of the State Supreme Court [R. 42], as well as by the fact that petitioner has cited no authority to the contrary.

This Court has sustained the Workmen's Compensation Act against this same attack that it makes a person liable without regard to any neglect or fault on his part and notwithstanding that it abrogates common law defenses and holds a person liable or guilty irrespective of fault or agency.[9]

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[7]16 C. J. S. 1162-3; *Treigle v. Acme Homestead Association*, 297 U. S. 189, 197, 56 S. Ct. 408, 80 L. Ed. 575; *Nebbia v. New York*, 291 U. S. 502, 537-8, 54 S. Ct. 505, 516, 78 L. Ed. 940.

[8]*Standard Oil Co. v. Marysville*, 279 U. S. 582, 584, 49 S. Ct. 430, 73 L. Ed. 856.

[9]*New York etc. R. R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, 250, 253-4, 61 L. Ed. 667; *Arizona Copper Co. v. Hammer*, 250 U. S. 400, 39 S. Ct. 553, 63 L. Ed. 1058; *Ward & Gow v. Krinsky*, 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033; *Cudahy Packing Co. v. Paramore*, 263 U. S. 418, 422, 44 S. Ct. 153, 154, 68 L. Ed. 366; 16 C. J. S. 1290.

A state law which permitted issuance of a motor vehicle operator's license to a minor only when the application therefor was signed by such minor's father, mother, guardian or employer and which made such signer liable with the minor for the latter's negligence when driving has been upheld as not repugnant to the Fourteenth Amendment, particularly as against the attack that such liability without fault may not be imposed.[10]

The Fourteenth Amendment protects the citizens in their right to engage in any lawful business, but it does not prevent legislation from prohibiting or regulating any business which is inherently vicious and harmful.[11]

It is to be noted that this case has to do with, and the rule here involved applies only to, horse racing "on the result of which there is wagering."[12]

It has long been thoroughly established that gambling in the various modes in which it is practiced is one of those occupations the tendency of which as shown by experience is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, and is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure.[13]

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[10]*Bispham v. Mahony* (Del.), 6 W. W. Harr. 318, 175 Atl. 320.

[11]*Murphy v. California,* 225 U. S. 623, 628, 32 S. Ct. 697, 56 L. Ed. 1229; *Adams v. Tanner,* 244 U. S. 590, 596, 37 S. Ct. 662, 665, 61 L. Ed. 1336.

[12]California Business and Professions Code, Secs. 19420, 19561.

[13]*Ex parte Tuttle,* 91 Cal. 589, 590-1, 27 Pac. 933.

This Court in rejecting an attack upon the constitutionality of an Ohio law making the real property which the owner knowingly permits to be used for gaming purposes liable for the payment of a judgment obtained by one of the participants against another participant in the gambling for money lost in play, said: "For a great many years past gambling has been very generally in this country regarded as a vice to be prevented and suppressed in the interest of the public morals and the public welfare. The power of the State to enact laws to suppress gambling cannot be doubted, and, as a means to that end, we have no doubt of its power to provide that the owner of the building in which gambling is conducted, who knowingly looks on and permits such gambling, can be made liable in his property which is thus used, to pay a judgment against those who won the money, as is provided in the statute in question. . . . The plain object of this legislation is to discourage and, if possible, prevent gambling. The liability of the owner of the building to make good the loss sustained under the circumstances set forth in the statute was clearly part of the means resorted to by the legislature for the purpose of suppressing the evil in the interest of the public morals and welfare. We are aware of no provision in the Federal Constitution which prevents this kind of legislation in a State for such a purpose."[14]

We submit that the only basis for review in this Court of the judgment in this case must rest upon the probability, or at least the possibility, that the rule here involved has no real and substantial relation to the object

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[14]*Marvin v. Trout,* 199 U. S. 212, 224-5, 26 S. Ct. 31, 34, 50 L. Ed. 157.

sought to be attained and is therefore so unreasonable, arbitrary, and capricious as to be in violation of the Fourteenth Amendment.

Our position is that the rule is so clearly and directly related to the object sought to be attained and so patently reasonable as to require no analysis or exposition to determine that it is *not* repugnant to the Fourteenth Amendment.

We believe that it will necessarily be conceded that it is not only "reasonable," but that it is highly desirable, if not absolutely essential, to require that every horse entered in a race upon which the public is invited to wager must be in sound condition and absolutely free from any artificial stimulant or depressant.

If it be conceded, as we think it must be, that it is in the interest of the wagering public and the continued welfare of regulated horse racing to insure that the horses entered in such races are in sound condition and to insure that there is no artificial stimulation or depression of any such horses, then we submit that it is not only reasonable but that it is highly logical and essential that someone be made absolutely responsible for the sound condition of such horses. That the trainer, who is the one person in constant charge, custody and control of the horses under him, should be the person to be held responsible for their sound condition follows inevitably.

The very fact that such a provision has been in force and effect in this State ever since the inception of horse racing under the 1933 Act and has been accepted with-

out question during all of this time by those engaged in horse racing in this State certainly sets an impressive seal of "reasonableness" upon this rule.

The further fact that the Jockey Club of New York, recognized nationally and internationally as the parent organization of horse racing in North America, has enforced a similar provision for many years lends overwhelming weight to the "reasonableness" of this rule.

The license issued to a trainer applies only to his occupation upon race tracks where wagering on the results is permitted by the State. It is a privilege granted by the State and not an inherent right.

Asserted "unreasonableness" can hardly be predicated merely upon the fact that the rule imposes strict liability on the trainer for something which may occur without his knowledge or participation. That the obligation of a guarantor of the sound condition of his horse thus placed upon a trainer will stimulate him to far greater care and closer supervision over the condition of such horse than would be the case if he were responsible only in the event that he, himself, administered a stimulant or depressant or participated in the same cannot be gainsaid.

This Court has said that the standards of reasonableness to which an administrator's action must conform are to be found in the terms of the Act construed and applied in the light of its purpose.[15]

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[15]*Federal Security Administrator v. Quaker Oats,* 316 U. S. 218, 232, 63 S. Ct. 597, 87 L. Ed. 724, 732.

Full and Fair Hearing Had.

Petitioner claims that he was denied the full hearing and the fair opportunity to rebut the charges made guaranteed by the Fourteenth Amendment. (Pet. for Certiorari, Point I, p. 11.) However, nowhere in his petition filed in the State Court of first instance does petitioner allege that he was denied any right to present evidence, or that any evidence whatsoever which he offered was excluded or rejected, nor that he was denied a reasonable opportunity to know the claims of the opposing party, or that he did not in fact know such claims. On the contrary, he specifically alleges that a hearing was duly held pursuant to notice therefor given, and at which petitioner was personally present, and evidence both oral and documentary was offered and received. [R. 1-2, par. III.]

A transcript of petitioner's hearing before the California Horse Racing Board, consisting of some 42 pages, was a part of the record in these proceedings in the State Court [R. 39], but for some reason petitioner has not made it a part of the record in this Court. This transcript discloses that petitioner was there in person, that at the outset of the hearing he was cautioned about proceedings without the benefit of counsel, but that he elected to do so and expressed himself as thoroughly satisfied to represent himself. This transcript shows full and ample evidence to substantiate the order made by the Board. It shows that petitioner was given every opportunity and did present everything that he desired to offer and that he took advantage of cross-examining at length some of the witnesses placed upon the stand. It also discloses that at the suggestion of the Board, itself, petitioner placed in evidence his own statement that he did not personally

administer the drug to the horse, nor give any instructions to anyone to do so and knew nothing about it.

Actually it is not the lack of a full and fair hearing and an opportunity to know and rebut any charges made of which petitioner complains, but rather because the fact that he personally did not administer the drug or did not knowingly participate in such administration was not accepted as a *complete* defense to the breach of the rule in question.

Maryland, Florida, and New York Decisions.

Petitioner makes the statement that the ruling of the California Supreme Court in this case conflicts with the conclusions reached by the Appellate Courts of Maryland, Florida and New York.[16]

As we have already said the Maryland rule was decidedly different from the one here involved in that it made the administration of the drug the offense rather than merely holding the trainer as being the absolute insurer or guarantor of the sound condition of the horse entered in the race.

Florida's Rule 117, insofar as pertinent here, is identical with that of the California Horse Racing Board. Florida, however, also has another Rule No. 109 which is to the same effect as California's Penal Code Section

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[16]Petition for Certiorari, p. 7; *Mahoney v. Byers,* ..... Md. ....., 48 Atl. (2d) 600; *State v. Baldwin,* ..... Fla. ....., 31 So. (2d) 627; *Smith v. Cole,* 62 N. Y. Supp. (2d) 226.

337(f). Apparently in a strained effort to follow the Maryland case, the Florida court held that in effect Rule 117 "provides that proof of the fact that a horse entered in a race has been administered a drug shall constitute irrebuttable evidence that the trainer has violated Rule No. 109. This is the reason why Rule No. 117 violates the due process clause of both our State and Federal Constitutions." It is interesting to note that the Florida court first by a four to three decision upheld the validity of the rule and then reversed itself by a similar four to three division holding the rule unconstitutional. In view of the well known presumption of constitutionality, in view of the presumption of the existence of facts justifying the rule,[17] in view of the principle that debatable questions as to reasonableness are not for the court but for the legislature,[18] and in view of the long standing existence and enforcement of this rule, the fact that the State of Florida considered the "reasonableness" of such a rule to be so finely balanced that it split four to three first one way and then the other does not, we submit, support any asserted "unreasonableness," "capriciousness," or "arbitrariness" of this police power measure to the extent of rendering it repugnant to the Fourteenth Amendment.

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[17]*Pacific States Box & Basket Co. v. White,* 296 U. S. 182, 185, 186, 56 S. Ct. 163, 80 L. Ed. 148.

[18]16 C. J. S. 569; *Wholesale Tobacco, etc. v. National & Co.,* 11 Cal. (2d) 634, 650, 82 P. (2d) 3; *Standard Oil Co. v. Marysville, supra,* 279 U. S. 582, 49 S. Ct. 430, 73 L. Ed. 856.

Extreme Cases Not Criterion.

Petitioner urges that the rule here involved authorizes the revocation of the trainer's license even though he were gagged, bound and rendered physically helpless while some one else administered the drug.[19]. The revocacation or suspension of the license rests in the sound discretion of the Board. That the Board takes due cognizance of mitigating circumstances is evidenced by its action in the instant case suspending the license for a period of six months only, and approximately only four months have to run after its order was made. [R. 1-2.]

"A possible application to extreme cases is not the test of the reasonableness of public rules and regulations" when tested by the Fourteenth Amendment.[20]

Petitioner asserts that this violates the provision of the State statute[21] expressly providing that no license shall be revoked without just cause. This has been decided by the State Court and is not a Federal question.

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[19]Petition for Certiorari, p. 17.

[20]*Lemieux v. Young*, 211 U. S. 489, 493, 29 S. Ct. 174, 175, 53 L. Ed. 295.

[21]California Business & Professions Code, Sec. 19513.

Conclusion.

We submit that the constitutionality of the imposition of strict liability is so well established and that the reasonableness of the rule in question in relation to the object sought to be attained is so manifest that it requires no further exposition or analysis to determine the same, and the writ herein may well be denied.

Respectfully submitted,

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